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RESPONSE REQUESTED

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No. 03-9627

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. PACE,
Petitioner,

v.

David DiGuglielmo
~~DONALD T. VAUGHN~~, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Third Circuit merely applied this Court's decision in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), holding that an untimely state petition for collateral review does not toll the deadline for filing a federal habeas corpus petition, is petitioner entitled to the grant of review on the grounds of a purported circuit conflict?

2. Should this Court grant review of petitioner's claim that his purported mistake of law mandated "equitable tolling" of the deadline for filing a federal habeas corpus petition?

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COUNTERSTATEMENT OF THE CASE[1]

On September 18, 1985, while robbing a random pedestrian of a brown-bag lunch, petitioner beat his victim to death with a blackjack. N.T. 2/13/86 at 45-74. On February 13, 1986, after a thorough and valid guilty-plea colloquy, petitioner pleaded guilty to second-degree murder and possessing an instrument of crime (PIC) before the Honorable David N. Savitt in the Philadelphia Court of Common Pleas (Bill Nos. 1272 and 1275, October Term, 1985). Id. at 26-67. Following further discussion, Judge Savitt imposed a mandatory life sentence for murder plus one to two years for PIC. Id. at 68-72. Thereafter, the Court reviewed counsel's request for placement in a rehabilitative facility and explained petitioner's appellate rights. Id. at 72-75. Petitioner did not file a direct appeal. His sentence became final in March of 1986.

On August 21, 1986, petitioner filed *pro se* his first state post-conviction petition under subchapter B, chapter 95, title 42 Pa.C.S. § 9541 *et seq*. (then titled the Post Conviction Hearing Act (PCHA)).[2] Counsel was appointed and filed an amended petition on March 11, 1987. After a hearing, counsel was permitted to withdraw. New counsel was appointed and filed another amended petition on October 27, 1989. The court held a hearing on March 26, 1991, at which petitioner testified that he had not known what it meant to be sentenced to life imprisonment. On July 23, 1991 (not 1992, *see* Petition for Writ of Certiorari ("Petition") at 2), the court dismissed the PCHA petition. Petitioner appealed to the Pennsylvania Superior Court, which affirmed in an unpublished memorandum on March 30, 1992.[3] That ruling became final when petitioner failed to seek discretionary review in the Pennsylvania Supreme Court within the 30-day filing period. Petitioner subsequently filed a Petition for Permission to File Petition for Allowance of Appeal *Nunc Pro Tunc*; it was denied on September 2, 1992. *Commonwealth v. Pace*, No. 81 E.D. Misc. Dkt. 1992. Thus, petitioner's first state post-conviction petition was pending from 1986 to 1992.

On November 17, 1995 (not in 1996, *see* Petition at 2), Pennsylvania's legislature amended subchapter B, chapter 95, title 42 Pa.C.S. § 9541 *et seq.* (then titled the Post Conviction Relief Act (PCRA)) to provide, in pertinent part:

> § 9545. **Jurisdiction and proceedings**
>
> (a) Original jurisdiction.—Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter.
>
> (b) Time for filing **petition**.—
>
> (1) Any **petition** under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes

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[1] Petitioner inappropriately interjects argument for equitable tolling within his Statement of the Case. Petition at 2-6. That argument is answered below, in Argument section II.

[2] The petition alleged, *inter alia*, that trial counsel had been ineffective, and that petitioner's guilty plea had been unlawfully induced. PCHA Petition at 3.

[3] The Superior Court, A72-76, found meritless petitioner's claims that he was "misled into entering his guilty plea by the statements and advice of his counsel and by the statements of the court [because he] did not know that a life sentence in Pennsylvania means a life sentence without the possibility of parole." A73. The Superior Court determined that the guilty plea court properly informed petitioner that he would receive a life sentence. The court held that the guilty plea colloquy was not confusing, noting that "a life sentence in Pennsylvania means a life sentence -- nothing more, nothing less," i.e., without parole, although there is always "the possibility that the governor could commute the life sentence to a term of years," A74 & A74 n.3. The court held that a passage in which the trial court referred to release, *i.e.*, commutation, could not have misled petitioner because the reference occurred "after the court had accepted appellant's guilty plea and had moved on to sentencing" A74 n.4. The Superior Court also found that, even if petitioner had possessed any misunderstanding on the issue before the plea, the colloquy made it "complete and quite clear that a life sentence would be imposed and that no other agreements or negotiations would be considered." A75.

final, unless the **petition** alleges and the petitioner proves that:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any **petition** invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S. § 9545 (in part) (effective January 16, 1996) (emphasis added). An integral and applicable part of the statute, which petitioner does not mention, provides a savings clause for first petitions:

> [T]he amendment of ... [these provisions] shall apply to **petitions** filed after the effective date of this act; however, a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's **first petition** is filed within one year of the effective date of this act.

Note, 42 Pa.C.S. § 9545 (emphasis added). This provision was passed by the General Assembly and signed into law by this Commonwealth's Governor with the rest of the PCRA amendments, which were published in advance of their effective date. The time-limit was designed to prevent the filing of repetitive petitions and to serve the important principle that "[a]t some point, litigation must come to an end." *Commonwealth v. Peterkin*, 722 A.2d 638, 643 (Pa. 1998).

At approximately the same time, the same motive animated that portion of the

Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), which amended the federal habeas statute at 28 U.S.C. §§ 2241 *et seq.*, effective April 24, 1996, to include a one-year statute of limitations. That time-bar also contains several "exception" start-dates, with tolling during the pendency of any "properly filed" state post-conviction relief petition. 28 U.S.C. § 2244(d). *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), discussing *Williams v. Taylor*, 529 U.S. 362 (2000). That statute, too, was published well before its effective date.

Thus, petitioner **was on notice** of both the state PCRA and federal habeas filing deadlines – including both statutes' exceptions – well before his federal habeas filing deadline, which was April 23, 1997. A17 (Report and Recommendation); *Pace-3*.

Nonetheless, on November 27, 1996, petitioner filed a second state post-conviction petition, reiterating the same claims he had exhausted in his 1986 PCHA petition.[4] Under the provisions of the statute above, his 1996 petition was untimely; his first petition under subchapter B had been filed in 1986, so the "grace period" did not apply. He made no claim within his 1996 petition that any of the time-bar exceptions applied.

After the filing, the trial court appointed counsel to represent the petitioner. On June 13, 1997, counsel filed a petition to withdraw and a "no-merit" letter under *Com-*

[4] He claimed, *inter alia*, that his guilty plea was unlawfully induced because "[n]either the court nor counsel ensured that Defendant understood that a consequence of his plea could or would be imposition of that term of life imprisonment without a minimum sentence for parole eligibility," that his life sentence was illegal because it really meant life without parole, and that all prior counsel were ineffective for failing to litigate these issues. PCRA Petition at 3-4. He falsely stated that the state courts had not passed upon these claims. PCRA petition at 6.

Petitioner's present certiorari petition focuses upon the state and federal courts' subsequent procedural treatment of this 1996 PCRA petition, but he fails to mention that the claims in it had **already been exhausted** in state court.

monwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988), *on remand from Pennsylvania v. Finley*, 481 U.S. 551 (1987), explaining that the 1996 PCRA petition's claims were meritless and were all but identical to those asserted in the 1986 PCHA petition.[5] The Commonwealth took no position. On July 23, 1997, Judge Savitt granted withdrawal and dismissed the PCRA petition based on the *Finley* letter. Petitioner appealed *pro se* to the Pennsylvania Superior Court, and on July 29, 1997, Judge Savitt issued an opinion explaining that he had denied the PCRA petition for the reasons in the *Finley* letter, because the "identical issue was not only raised and decided in a collateral proceeding but also reviewed by the Superior Court and decided against petitioner," and because "[p]etitioner's guilty plea colloquy was thorough and compete, petitioner answered every question indicating that he understood and there is no showing on the record of the previous collateral proceedings that petitioner was misled by trial counsel." A79 (PCRA court opinion).

Petitioner appealed the dismissal of his second post-conviction petition. In his April 8, 1998 brief to the Pennsylvania Superior Court, petitioner reiterated his issue: invalid life sentence, invalid guilty plea induced by his alleged misunderstanding of the fact that life means life in Pennsylvania, and ineffectiveness of all prior counsel for allowing this to occur. Superior Court brief at 6-7.

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[5] The *Finley* letter reported that petitioner's claims were (1) whether he was "misled into entering his guilty plea" and (2) whether "trial counsel was ineffective for failing to properly advise him of the consequences of his guilty plea" and prior PCHA/PCRA counsel was ineffective for "failing to subpoena trial counsel to testify at the evidentiary hearing." A99 (*Finley* letter). Counsel concluded that petitioner "arrives at the Post Conviction Relief Act stage of his legal journey having fully and completely had an opportunity to litigate all issues, real and imagined, in his case before the Pennsylvania Courts (Common Pleas Court, Superior Court, and Petition to the Supreme Court)." *Id.* at A102-103.

In response the Commonwealth argued that the 1996 PCRA petition had been untimely, asking that the "clear and unambiguous" PCRA time-bar (quoted above) "be given effect in accordance with its plain and obvious meaning" under state precedent. A116 (Commonwealth's brief). On December 3, 1998, the Pennsylvania Superior Court agreed, finding that the 1996 collateral petition had been untimely and that the PCRA court had therefore lacked jurisdiction. A80-86 (Superior Court opinion). It added that state law entitled it to affirm the PCRA dismissal on a different ground than that utilized by the PCRA court. *Id.* at A86 n.4. The Superior Court cited *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997), and *Commonwealth v. Perry*, 716 A.2d 1259 (Pa. Super. 1998), in each of which a trial-level PCRA court had similarly mistakenly acted upon an untimely-filed PCRA petition but on appeal was found to have lacked jurisdiction. *Id.* at A85. The appellate court further found that petitioner had asserted none of the PCRA time-bar exceptions and that none applied. *Id.* at A85-86.

On December 15, 1998, petitioner filed for reargument in the Superior Court, asserting for the first time a PCRA time-bar exception. 42 Pa.C.S. § 9545(b)(1)(i) (reproduced above). A104-112. The Commonwealth answered that Pennsylvania Rule of Appellate Procedure 302(a) prohibited him from raising new issues on reargument.[6] A113. The Superior Court denied reargument. A122. The Pennsylvania Supreme Court denied

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[6] The PCRA time-bar statute also requires that any exception be alleged in the PCRA petition itself; jurisdiction to consider such a petition resides in the trial court alone. 42 Pa.C.S. § 9545(a) and (b). Any exception has a 60-day deadline tied to the filing date of the petition in which it is asserted. 42 Pa.C.S. § 9545(b)(2). Petitioner filed his reargument petition in the Superior Court over two years after filing his PCRA petition in the Court of Common Pleas. Further, the only way to invoke this exception under the PCRA statute is to offer proof. 42 Pa.C.S. § 9545(b)(1). New evidence may not be presented to the Superior Court. Pa. R. App. P. 302(a).

review on July 29, 1999. *Commonwealth v. Pace*, 740 A.2d 1146 (Pa. 1999) (table). A124.

On December 22, 1999, petitioner executed[7] his federal petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. § 2254(d), initiating the present action.[8] Respondents replied that the habeas petition was untimely under 28 U.S.C. § 2244(d) and should be dismissed. On April 28, 2000, Magistrate Judge M. Faith Angell filed a Report and Recommendation (R&R) concluding that petitioner was not entitled to statutory tolling for his untimely 1996 PCRA petition, and that his habeas petition was therefore untimely. A11-19 (R&R). Magistrate Judge Angell concluded that the federal statute of limitations for filing a habeas petition had run from April 24, 1996, until it expired on April 23, 1997, under *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998). A17. Petitioner's untimely 1996 PCRA petition did not toll the running of the statute because it was not "properly filed" under state law. A18.

Over one year later, on June 7, 2001, in a published opinion, Chief Judge Giles found the habeas petition timely, granting petitioner both statutory and equitable tolling. The judge rejected as binding the Third Circuit's recent precedent on the issue, *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001), *cert. denied sub nom Horn v. Fahy*, 534 U.S. 944

[7] The Third Circuit applies the "mail box" rule of *Houston v. Lack*, 487 U.S. 266 (1988), to *pro se* habeas petitions. *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998).

[8] In his petition, he claimed that his guilty plea was unlawfully induced and unknowingly entered because trial counsel purportedly misled him into thinking his life sentence would be less than a life sentence, habeas petition at 7 and 7 reverse (¶12.A); that counsel was ineffective for this, habeas petition at 8 and 8 reverse (¶12.B); and that his rights to due process, equal protection, the effective assistance of counsel, and against cruel and unusual punishment were all violated by his allegedly illegal life sentence, habeas petition at 8 and 8 reverse (¶12.C). These are the same claims he exhausted in his 1986 PCHA and round of state appeal and that he re-asserted in his time-barred 1996 PCRA and round of state appeal.

(2001). In the *Fahy* case, the Third Circuit had rejected statutory tolling for untimely state collateral petitions. The appeals court had further ruled that an alleged mistake of law – identical to that presented here – might justify equitable tolling, but only in a capital case, never in a non-capital case. Nevertheless, Judge Giles found tolling, ruling that just as "death is different," life is different too.

The Commonwealth sought reconsideration and/or certification to appeal the interlocutory order. Nine months later, in a superseding second memorandum and order, the district court denied reconsideration but granted respondents permission to appeal. *Pace-2*. Granting certification to appeal, the district court found "substantial grounds for difference of opinion" on whether *Fahy* had prohibited statutory and equitable tolling under the circumstances of this case. Respondents appealed, arguing that *Fahy* squarely controlled both points.

In the interim, the Third Circuit decided *Merritt v. Blaine*, 326 F.3d 157 (3d Cir.), *cert. denied*, 124 S.Ct. 317 (2003), which, relying on *Fahy*, reiterated that an untimely state collateral petition did not create statutory tolling, and that an alleged mistake of law like petitioner's did not justify equitable tolling in a non-capital case. Petitioner acknowledged in the court of appeals that *Merritt* was "'materially indistinguishable'" from his own case. *Pace-3* at 129. Accordingly, on July 30, 2003, the Third Circuit reversed the district court's ruling and ordered petitioner's habeas petition dismissed.

REASONS FOR DENYING THE WRIT

I. Where the Third Circuit merely applied this Court's decision in *Carey v. Saffold*, 536 U.S. 214, 226 (2002), holding that an untimely state petition for collateral review does not toll the deadline for filing a federal habeas corpus petition, petitioner is not entitled to the grant of review.

Petitioner made no request in his state collateral petition for applying any of the exceptions to the one-year time limit provided in Pennsylvania law. *See* Pennsylvania Post-Conviction Review Act (PCRA), 42 Pa. C.S. § 9545(b). Because that petition was plainly filed beyond the deadline, it was dismissed by the state courts, which as a matter of state law are without jurisdiction to consider post-conviction petitions that are untimely. Accordingly, the Third Circuit Court of Appeals declined to give tolling effect to the state petition for purposes of the deadline for filing a federal habeas corpus petition. 28 U.S.C. § 2244(d)(2)(tolling permitted only for "properly filed" state collateral petitions).

In requesting review before this court, petitioner now argues that the **mere presence** of exceptions within the PCRA time-bar statute – or in any state's time-bar statute – creates the possibility of judicial review. Such review, contends petitioner, may involve consideration of some aspect of the merits of the state petition. Therefore, concludes petitioner, a state petition, even if untimely, is "properly filed" for purposes of § 2244(d)(2), and so **every** untimely PCRA petition filed in Pennsylvania – or in any state with a similar statute – tolls the deadline for seeking federal habeas corpus review. Petitioner claims that the weight of authority in the circuit courts follows this dubious reasoning.

This Court, however, has already eliminated the premise of petitioner's position in *Carey v. Saffold*, 536 U.S. 214 (2002), which held that untimely state petitions for collateral review do *not* toll the time for seeking federal habeas review under 28 U.S.C. §

2244(d)(2). There, the California high court denied a state petition for collateral review both on the merits and for "lack of diligence." The latter phrase might have indicated that the court found the petition to be untimely under that state's indeterminate deadline. Saffold subsequently filed a federal habeas petition, seeking tolling of the federal filing deadline for the period between the filing of his state collateral petition and its rejection by the California Supreme Court. The Ninth Circuit held that, because the California court had referred to the merits in denying the state petition, the state court must have found the petition timely. *Id.* at 225. This Court disagreed:

> A court will sometimes address the merits of a claim that it believes was presented in an untimely way.... Given the variety of reasons why the California Supreme Court may have included the words "on the merits," those words cannot by themselves indicate that the petition was timely.

Id. at 225-26 (citations omitted). It remained unclear whether by also denying for "lack of diligence," the state court had been referring to unreasonable delay in filing, the equivalent of an "untimely appeal" finding in other states. This Court remanded for an answer to that question, *id.* at 227, holding that:

> If the California Supreme Court had clearly ruled that Saffold's 4 1/2-month delay was "unreasonable," **that would be the end of the matter**, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was "entangled" with the merits.

Id. at 226 (emphasis added). This Court thus finds conclusive a state court's judgment on its own filing requirements – including deadlines that are not absolute and require judicial scrutiny, such as California's. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state law questions").

Petitioner claims that *Saffold* can be ignored because it addressed only whether

the state petition in question was "pending" while it was before the California Supreme Court, not whether it was "properly filed" before that court. *See* 28 U.S.C. § 2244(d)(2). But petitioner fails to explain how the petition could have been properly filed yet never pending. If, as *Saffold* holds, an untimely state post-conviction petition was never even pending for purposes of § 2244(d)(2), then it could not have been properly filed. By the same token, if the petition had been properly filed, then it would be pending until its resolution.

To avoid this problem, petitioner suggests that time limits on state collateral petitions may be altogether immune from the "proper filing" requirements of § 2244(d)(2). He points to this Court's previous § 2244(d)(2) decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), which, he asserts, "explicitly declined to address" the issue of whether "**time** limits on state post-conviction proceedings" will "prevent a state post-conviction petition from being 'properly filed.'" Petition at 13 (emphasis in original). That is false. In describing the "proper filing" requirements contemplated by § 2244(d)(2), the Court stated specifically that "[t]hese usually prescribe, for example ... the **time limits** upon its delivery." *Id.*, 531 U.S. at 8 (emphasis added) (citing, *inter alia*, *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998)) (Pennsylvania PCRA timely filing statute is an example of a proper filing requirement).

The only question remaining after *Artuz* was whether untimely state court petitions could nonetheless toll under § 2244(d)(2) if the timeliness question was subject to judicial review, including possible review involving the merits. This Court's holding in *Saffold* resolves that question: if a state court were to rule a collateral petition untimely, "that would be the end of the matter, regardless of whether it also addressed the merits of

the claim, or whether its timeliness ruling was 'entangled' with the merits." 536 U.S. at 226.

In light of *Saffold*, petitioner's discussion of the state of circuit court authority is irrelevant; but it is also inaccurate. Petitioner claims that most of the circuits reject the Third Circuit's application of *Saffold*. In fact, only one circuit is clearly in conflict – the Ninth – while several are exactly in accord.

As petitioner acknowledges, the Seventh[9] and Third[10] Circuits have both concluded that, under *Saffold*, an untimely state collateral petition does not toll the federal habeas deadline, whether or not the state time-bar allows for judicial review of possible exceptions.

The Sixth Circuit agrees with this result, though it has not explicitly addressed *Saffold*.[11]

The Fourth Circuit has similarly found that *Saffold* means that judicially-created

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[9] *Brooks v. Walls*, 279 F.3d 518 (7th Cir. 2002), *reh'g & reh'g en banc denied, Brooks v. Walls*, 301 F.3d 839 (7th Cir. 2002), *cert. denied*, 538 U.S. 1001 (2003).

[10] *Pace-3; Merritt, supra; Fahy, supra; Lovasz, supra.* Even a liberal student critic of the AEDPA, arguing stridently against its time-bar, agrees that after *Saffold*, "[a]ny state petition found to be untimely under the state procedural rules will not qualify as 'properly filed' (addressing the dissent's concerns) under the AEDPA and so the issue of tolling is foreclosed." Karen M. Marshall, *Note: Finding Time for Federal Habeas Corpus: Carey v. Saffold*, 37 Akron L. Rev. 549, 584 (2004). She finds, "The Third Circuit has definitively followed *Carey*." *Id.* at 584 n.194.

[11] *Vroman v. Brigano*, 346 F.3d 598, 601-604 (6th Cir. 2003) (post-*Saffold*, habeas petition untimely because no statutory tolling for Ohio post-conviction motion ruled untimely under time-bar with exceptions); *Israfil v. Russell*, 276 F.3d 768 (6th Cir. 2001) (pre-*Saffold*, habeas petition untimely because third Ohio post-conviction motion not properly filed since ruled untimely under exception-containing deadline); *State v. Israfil*, 1999 WL 960971 (Ohio App. 2 Dist. 1999) at *3 (exceptions). *See Keenan v. Bagley*, 262 F.Supp.2d 818, 822 (N.D. Ohio 2002) (*Smith/Dictado* inconsistent with *Israfil*).

exceptions do not undermine a state filing deadline.[12]

Petitioner cites the Eleventh Circuit as one court going the other way, but in reality that circuit's precedent is at best unclear. Petitioner relies on *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003). *Siebert*, however, claims that its position is in accord with the Seventh Circuit. *Id.* at 1030-31. And a more recent decision addressing untimeliness under § 2244(d)(2) further suggests lack of confidence in the rationale argued by petitioner.[13]

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[12] Answering an argument that a state petition was "pending" until after a rehearing period, where rehearing was not available, but the court sometimes ignored that rule, it wrote:

> Rouse contends that, notwithstanding Rule 31(g), rehearing was available because the Supreme Court of North Carolina has "used its discretionary authority to reconsider denials" of such petitions. (Reply Br. at 10.) Rouse, however, did not seek such review. Moreover, the fact that North Carolina sometimes suspends or creates **exceptions** to its procedural rules does not mean that the state proceeding was "pending." *Cf. Carey*, 536 U.S. at 223-25 (noting that there would be no tolling of the statute of limitations during time that a prisoner might file a petition for an original writ of habeas corpus in a state supreme court where the original writ procedure is only exercised in extraordinary cases); *Allen v. Mitchell*, 276 F.3d 183, 185-86 (4th Cir. 2001) (no tolling of statute of limitations for time after appeal period ended and before untimely petition was actually under consideration by state court even though "state courts frequently suspend or create exceptions to their procedural rules, and . . . review may therefore be available even after deadlines have expired" and even though the state court did in fact consider the untimely petition for appellate review).

Rouse v. Lee, 339 F.3d 238, 244 (4th Cir. 2003) (en banc), *cert. denied*, ___ U.S. ___, 124 S.Ct. 1605 (2004) (emphasis added).

[13] Just because there are objectively defined exceptions -- whether in a statute or judicially created -- does not mean the procedural rule stated in O[fficial] C[ode of] G[eorgia] A[nnotated] § 9-14-52(b) becomes discretionary and not jurisdictional.

Wade v. Battle, ___ F.3d ___, 2004 U.S. App. LEXIS 16244 at *26 n.8 (11th Cir., Aug. 6, 2004).

The Fifth Circuit, on which petitioner also relies, in fact appears to have acknowledged the impact of *Saffold*, but has distinguished it on the ground that the state post-convictions under review were denied entirely on the merits, and were never found untimely in state court.[14]

Petitioner claims that the Second Circuit "seems" to have endorsed his approach in its decision in *Robinson v. Ricks*, 56 Fed. Appx. 7 (2d Cir. 2003) (not precedential). In fact, the circuit there simply granted a motion to remand to the district court for reconsideration in light of *Saffold*.

Thus, the Ninth appears to be the only Circuit that, after *Saffold*, continues to apply the view that the mere presence of exceptions in a time-bar statute renders every untimely-ruled post-conviction petition "properly filed" for federal habeas purposes. The Ninth Circuit is alone and in error in this regard, but that error is no reason to grant certiorari in this case, in which the Third Circuit did not err.

Here, the PCRA time-bar statute was applied by the state courts to find petitioner's PCRA petition untimely. That is "the end of the matter." *Saffold*, 536 U.S. at 226. There is thus no need to grant the writ of certiorari on the statutory tolling question.

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[14] *Grillette v. Warden*, 372 F. 3d 765 (5th Cir. 2004); *Dixon v. Cain*, 316 F.3d 553 (5th Cir. 2003).

II. Review is unwarranted for petitioner's alternative contention that he entitled to equitable tolling of the federal habeas deadline, where the only "inequity" he claims is that he made a mistake of law in guessing that he would receive statutory tolling during the pendency of his facially untimely state post-conviction petition.

Petitioner provides no recognized reason that this Court should grant certiorari regarding his bid for equitable tolling. *Compare* Supreme Court Rule 10 *with* Petition at 27-34. He says he thought he had a reason for choosing to re-exhaust his claims in his untimely 1996 state PCRA petition, instead of filing a timely federal habeas petition then: that the PCRA time-bar would not be upheld literally but would be ignored by the state courts. Had that transparently unlikely event occurred, the state petition would have been "properly filed" under § 2244(d)(2) and the federal habeas deadline would have been tolled. The fact petitioner's hoped-for resolution did not occur, however, is not unfair or even unusual; nor is there anything unfair about the Third Circuit's refusal to grant equitable tolling for his mistake of law. He points to **no** other Circuit that would toll under these circumstances. Even if equitable tolling does apply to the federal habeas statute, it cannot apply here, as the Third Circuit found. *Pace-3*. The Court, therefore, need not review this question.

This Court has not yet had occasion to address whether equitable tolling is available within the federal habeas time-bar context.[15] Even if it does apply to the habeas

[15] Several Justices of the Court have suggested equitable tolling might be appropriate in some habeas contexts. *See e.g., Pliler v. Ford*, ___ U.S. ___, ___, 124 S.Ct. 2441, 2448 (2004) (O'Connor, J., concurring); *Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Souter, J., concurring) and (Stevens, J., concurring in part and concurring in the judgment), and at 192 (Breyer, J., dissenting, joined by Ginsburg, J.). Still, it is arguable that equitable tolling should not apply to the habeas statute at all. By adopting a federal statute establishing defi- (continued)

time-bar, however, it still cannot excuse petitioner's lateness. His only argument is that he made a reasonable mistake of law by choosing to file a second, time-barred PCRA petition in 1996, in which he re-asserted his already-exhausted claims, instead of filing a timely federal habeas petition in 1996 containing those already-exhausted claims, which

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nite filing limits for certain actions, "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Soriano v. United States*, 352 U.S. 270, 276 (1957). Equitable tolling is prohibited where the statutory language allows for no supplemental timeliness exceptions, or where the purposes and logical coherence of the statute would be undermined by it. *See Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 95-96 (1990). "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (citing *United States v. Brockamp*, 519 U.S. 347 (1997)). In *Brockamp*, as in *Irwin*, this Court asked: "Is there good reason to believe that Congress did **not** want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350 (emphasis in original).

There is good reason here. Congress included three alternative starting dates, incorporating equitable tolling exceptions **within** the habeas statute of limitations. 28 U.S.C. § 2244(d)(1)(B-D). *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) (where "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Further, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). This general interpretive principle, "*expressio unius est exclusio alterius*," is valid where its application indicates Congressional intent and yields an interpretation consistent with the language, purpose, and policy of the relevant statute. *See Andrus*. An examination of AEDPA's provisions concerning capital cases shows Congress did not intend the doctrine to apply under Section 2244(d). Under Title I, Section 107 of AEDPA, Congress added a new Chapter 154 to Title 28 of the United States Code, entitled "Special Habeas Corpus Procedures in Capital Cases." New Section 2263 of Title 28 specifically addresses the filing of capital habeas applications and sets forth strict and detailed timeliness requirements in those capital cases governed by Chapter 154. Section 2263(b) describes conditions for tolling of the filing requirements. Congress chose to include among these tolling conditions a general "catch all" provision at Section 2263(b)(3)(B), which specifies that a habeas filing may be tolled during an additional period not to exceed 30 days, if "a showing of **good cause** is made for the failure to file the habeas corpus application within the time period established by this section." (Emphasis added.) This type of exception – essentially a general equitable tolling provision – was **not** included by Congress in Section 2244(d). Applying the *exclusio unius* principle, it follows that Congress did **not** intend a general "good cause" exception to apply to Section 2244(d). *See Russello, supra*; *Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

would have been reviewed on the merits. Even if his alleged mistake in thinking the PCRA time-bar statute did not mean what it literally said when it was published could be characterized as reasonable, his own **choice** did not **prevent** him from filing -- and it is thus not sufficient to justify equitable tolling.[16]

For equitable tolling to apply, this Court requires that some unusual obstacle outside of a petitioner's own control must have prevented him or her from filing on time despite the exercise of reasonable diligence. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (*per curiam*) (list of obstacles includes inadequate notice of trigger for suit, a pending motion, an action of the court misleading a petitioner into thinking all that is required has been completed, or affirmative misconduct by plaintiff). *See also Irwin v. Department of Veterans' Affairs*, 498 U.S. 89, 95-96 (1990) (obstacles include filing a defective pleading during statutory period). During the relevant tolling period, including after the obstacle to filing is removed, the petitioner must exercise reasonable diligence in attempting to file on time. "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin*, 466 U.S. at 151. The Third Circuit followed that law here. *Pace-3* at 129.

By choosing to file only a second state post-conviction petition in November of

[16] When petitioner filed his time-barred PCRA petition on November 27, 1996, the PCRA time-bar had been published for one year and had been in effect for ten months, and the published federal habeas time-bar had been in effect for seven months. When petitioner filed his time-barred federal habeas petition on December 27, 1999, the federal habeas time-bar had been in effect for over three and one-half years. Yet petitioner argues to this Court that he should be granted equitable tolling because when he filed his time-barred PCRA petition, the PCRA time-bar had not yet come into existence ("That change in state law, however, occurred long **after** Petitioner filed his PCRA petition"), and PCRA review still "reasonably appeared to be available," and that he filed "within the AEDPA year," directly contradicting the AEDPA statute. Petition at 29. All of this is incorrect.

1996 and not also (or instead) a federal habeas petition by his April 1997 deadline, petitioner speculated that the state and federal courts would not apply the plain language of the PCRA time-bar and federal habeas time-bar straightforwardly despite his colorable argument that they should not. All he complains of today is that they did. That is not a reason for equitable tolling, and it is not worthy of certiorari.

"[T]he principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect." *Irwin* at 96. Mistakes about, or ignorance of, the law amounts only to **in**excusable neglect. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 392 (1993) ("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463-64 (8th Cir. 2000) (district court abused its discretion by concluding miscalculation of the date on which notice of appeal was due was "excusable neglect"). Every Circuit known to respondents to have considered the question has found that legal mistakes, whether by a petitioner or the petitioner's attorney, do not justify equitable tolling.[17] Unless publica-

[17] *See U.S. v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (petitioner's "misconception about the operation of the statute of limitations is neither extraordinary nor a circumstance external to his control"); *Nolan v. U.S.*, 358 F.3d 480 (7th Cir. 2004) (contrary interpretation of the law by prisoner insufficient for equitable tolling); *Cross-Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir. 2003) ("Even in the case of an unrepresented prisoner alleging a lack of legal knowledge or legal resources, equitable tolling has not been warranted.") (quotation marks omitted); *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002) ("a petitioner's ignorance or mistake is insufficient to warrant equitable tolling") (citation omitted); *Smaldone v. Senkowski*, 273 F.3d 133, 138-39 (2d Cir. 2001) (attorney's mistake about deadline does not justify tolling), *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir. 2001) (*pro se* prisoner misreading the law does not justify equitable tolling); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001) (ignorance of law no reason for tolling); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) ("[a]ny miscalculation or misinterpretation by Steed's attorney in interpreting the plain language of the statute does not constitute an extraordinary (continued)

tion notice is invalid, petitioner had a duty to read and heed the published state and federal time-bars; where such a duty exists, ignorance of the law cannot suffice as an excuse.

Even if petitioner was "confused" and there was some legal uncertainty, a lack of certainty in law is not an extraordinary circumstance that poses an obstacle to filing, as the Third Circuit found. *Pace-3* at 129. It is, in fact, a universal condition; otherwise, lawyers would be unnecessary.[18] Every deadline, and every rule, whether or not it contains express exceptions, is subject to legal argument about its applicability in individual cases. That not only may require some level of judicial review -- it always will require some degree of uncertainty. It is impossible to design a deadline statute, or any law, that is not susceptible to argument about its applicability in exceptional circumstances.

Further, as the Seventh Circuit has stated:

> The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest. The deadline simply was missed. That is not grounds for equitable tolling.

United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000). That is, as the Third Circuit correctly found, petitioner did not exercise reasonable diligence in attempting to file and thus would not qualify for equitable tolling in any event – even if mistake of law could generally be grounds. *Pace-3*. He claims that the lack of published cases upholding the statute caused his confusion that prevented him from filing. But even if that was such an obstacle (which is denied), he did not file promptly after December 17, 1997, the date on which the Pennsylvania Superior Court issued the first published state cases applying the 1996 PCRA time-bar. *Pace-3* at 129 and 129 n.1, citing *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997), and *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. 1997). Instead, he waited to file his federal habeas petition for **over two years**[19] after those cases were published.

Thus, equitable tolling could never apply here. No obstacle prevented petitioner from filing in 1996, when his claims were ripe for review; his mistake of law is no reason for tolling. Further, he was not reasonably diligent in attempting to file even after his claimed obstacle to filing – the lack of cases upholding the time-bar – was removed.

In any event, petitioner is incorrect, even as a matter of state law, in claiming that he could not reasonably have understood that his state post-conviction petition would be dismissed as untimely, and thus that his federal habeas deadline would not be statutorily

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circumstance sufficient to warrant equitable tolling"); *United States v. Baker*, 197 F.3d 211, 218-19 (6th Cir. 1999) (accepting ignorance of the law as an excuse would encourage and reward indifference to the law); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (lawyer's mistake does not warrant tolling); *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy and ignorance of law not cause excusing default); *School District of Allentown v. Marshall*, 657 F.2d 16, 20-21 (3d Cir. 1981) ("ignorance of the law is not enough to invoke equitable tolling"); *U.S. v. Erdoss*, 440 F.2d 1221 (2d Cir. 1971) ("Generally a party who makes an informed choice will not be relieved of the consequences when it subsequently develops that the choice was unfortunate") (citation omitted). *See also Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) (refusing to excuse lay persons from compliance with Title VII statute of limitations, even though some courts of appeals had adopted a more lenient interpretation of the time limit).

[18] There is nothing unfair about having to choose among available but not infallible legal strategies. That is the position in which virtually all litigants find themselves. As Justice Souter wrote for a unanimous Court, "The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule." *Rotella v. Wood*, 528 U.S. 549, 561 (2000). *See also Reed v. Mokena School District No. 159*, 41 F.3d 1153, 1155 (7th Cir. 1994) ("The unsettled state of the law, standing alone, is not sufficient to trigger the invocation of equitable principles"). From the beginning, petitioner faced an obvious, significant, unavoidable risk that a PCRA petition filed after the expiration of the state statutory deadline would be dismissed – and that if he did not file his habeas petition by a deadline calculated with the assumption that the untimely PCRA would not toll the federal statute of limitations, it would be dismissed for untimeliness as well. He chose to ignore those risks.

[19] Petitioner filed his current habeas petition on December 27, 1999.

tolled. His argument, based primarily upon two law review articles,[20] is inaccurate and depends upon merging two categories: conditions to filing, and conditions to obtaining relief.[21]

This merger of categories requires petitioner to engage in the even more extreme "verbal gymnastics" of creating new terminology, which he does. *Artuz*, *supra*. But what petitioner calls "**statutory** bar rules," Petition at 3 (emphasis in original), which allegedly include **both** petition-filing requirements and conditions to avoiding claims' default, simply do not exist in Pennsylvania law. There have likewise never been Pennsylvania "bar-overcoming rules," Petition at 4, "bar-trumping rules," *id*, "court-made anti-bar rules," Petition at 5 -- or any such synonym -- that allegedly act to overcome **both** application-

[20] These local defense-oriented articles were written by criminal defense attorneys who are associates and friends of petitioner's current counsel, as detailed in the courts below.

[21] This Court in *Artuz* sharply distinguished between these categories, stating that the basis for distinguishing state rules necessary for "proper filing" from those that are not is whether the rule is a condition to filing (an entire petition) or a condition to obtaining relief (upon individual claims asserted within a petition). Pennsylvania has both, and they are plainly differentiated.

The PCRA's provision labeled "Time for filing petition," 42 Pa.C.S. § 9545(b), reproduced above, resides in the section of the PCRA governing jurisdiction. The state's courts have consistently held that its judges lack jurisdiction to review a post-conviction petition unless the filing deadline has been met. *See, e.g., Commonwealth v. Howard*, 788 A.2d 351, 353 (Pa. 2002); *Commonwealth v. Crawley*, 739 A.2d 108 (Pa. 1999); *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999); *Commonwealth v. Yarris*, 731 A.2d 581, 586 (Pa. 1999); *Commonwealth v. Banks*, 726 A.2d 374, 375-76 (Pa. 1999); *Commonwealth v. Cross*, 726 A.2d 333, 334-36 (Pa. 1999); *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998); *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. 1997); *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. 1997). Under *Artuz*, compliance with § 9545(b) is a condition to **proper filing** under 28 U.S.C. § 2244(d)(2).

In contrast, the PCRA contains a separate provision explicitly labeled "Eligibility for relief." This section lists substantive claims, such as ineffective assistance or newly-discovered evidence, on which post-conviction relief is available. *See* 42 Pa.C.S. § 9543. The provision also contains requirements for relief that are not dependent on the nature of the claim raised: e.g., that the claim has not been previously litigated or waived. *See* 42 Pa.C.S. § 9543(a)(3). These claim-relief requirements are like those at issue in *Artuz*.

filing deadlines and the default of **claims** in them. These overbroad categories are fictional and were created exclusively by defense attorneys to combat AEDPA's time-bar.

Although there are state means of overcoming the default of claims in a PCRA petition, there are no extra-statutory exceptions to the time limit for filing a petition. It was never reasonable to presume, without qualification, that exceptions from one category would apply to the other. *Artuz*. The cases petitioner cites, Petition at 3-4, n.2-4, concern doctrines involving overcoming the default of claims, not the untimely or otherwise improper filing of petitions.[22] Since there was no PCRA time-bar before 1995, and since these pre-existing doctrines only operated to excuse the default of claims, it is false that "Pennsylvania prisoners reasonably expected they would trump the PCRA time-bar," Petition at 4. Any such expectation was manifestly unreasonable and a long-shot gamble, as petitioner's language aptly indicates. A reasonable prisoner would not have bet on such long odds, but would instead have played it safe, filing a timely federal habeas petition under the assumption that both the state PCRA and federal habeas time-bars were valid as written.

Pace's argument that it was reasonable of him to bet the petition-filing deadline would be "trumped" by claim-relief default doctrines is undermined by the fact that on its face, **before** any published opinions existed, the clear PCRA deadline statute **itself** took into account several of what he calls the "anti-bar" exceptions -- and set separate **petition-filing** deadlines for them. *See* discussion above. It was unreasonable to believe these excuses could be used to "trump" the specific PCRA time-bar deadline set in that

[22] However, his characterization of *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. 1997), as being in this category is inaccurate, as discussed below. Petition at 3 n.3.

statute for filing PCRA petitions containing such "anti-bar" claims.

The cases petitioner cites to support the notion that there was uncertainty in state law when he filed his time-barred PCRA petition in 1996 were issued **after** he filed that petition and do not stand for what he claims they do. These cases show no uncertainty in the law when petitioner filed his second and untimely state post-conviction petition in 1996. Nor do they demonstrate inconsistent or confusing application of it. Indeed, petitioner has not identified a single state **appellate** case where the time-bar was not applied. There were no such cases. The state cases he does cite, Petition at 7 n.10, stand for the proposition that if, as here, a **trial** court fails to realize the time-bar applies -- in almost every case he cites, the issue of timeliness was never even **raised** in the lower court -- then the Pennsylvania appellate courts will correct the mistake.

Thus, petitioner is hardly in a position to claim that state law compelled his delay in filing, or that the law created an impediment beyond his power to circumvent. Indeed, state law was full of alarm bells counseling prompt filing; all petitioner had to do was heed them. Petitioner argues that his "*pro se* status, indigence, and imprisonment also support equitable tolling." Petition at 32. That is incorrect. "[H]abeas relief, by definition, is almost always sought by an incarcerated petitioner, and we decline to find that this circumstance is so extraordinary as to warrant the application of this rarely-applied doctrine." *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001).

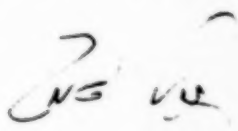
Petitioner also argues that his life sentence is relevant. Petition at 32. It is not. A life sentence for murder is routine. *See Rotella v. Wood*, *supra*, 528 U.S. at 561 ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."). Further, as the Fourth Circuit has recently expounded at length, the

gravity of a prisoner's sentence is not relevant to equitable tolling. *Rouse v. Lee*, 339 F.3d 238, 251-257 (4th Cir. 2003) (en banc), *cert. denied*, ___ U.S. ___, 124 S.Ct. 1605 (2004). Petitioner's argument, in fact, shows the danger of basing equitable tolling solely on the gravity of a prisoner's sentence, as the Third Circuit did in *Fahy*.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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